Thus, if the consumer is to be the touchstone for the Commission's CPNI Rules, those Rules as currently formulated generally accomplish the right result. Despite their general conformity to consumer expectations, however, the Commission's CPNI Rules, as currently crafted, are over-responsive to consumer interests. The reasons for this over-responsiveness are complex and may reflect nothing more than a regulatory agency embarking on the crafting of "information policy" prior to the time that such task was well understood by all the participants.

In any event, the currently crafted CPNI rules are deficient in the following particulars: First, they suggest that customers have more "privacy rights" with respect to U S WEST's transactional data than those same customers would have (or could expect) with respect to data held by other companies. The validity of this suggestion has never been tested or analyzed

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[46](...continued)
from small businesses to "restrict" CPNI.

With regard to our most recent BNA notification (mandated by the Commission's Second BNA Reconsideration Order (In the Matter of Policies and Rules Concerning Local Exchange Carrier Validation and Billing Information for Joint Use Calling Cards, Second Order on Reconsideration, 8 FCC Rcd. 8798, 8808 ¶ 57 (1993) ("Second BNA Reconsideration Order")), U S WEST sent out between 10 and 11M customer notifications. (While, theoretically, the notifications were required to be sent only to customers with nonpublished and nonlisted telephone numbers, it would have been prohibitively expensive to "segregate" these customers for notification purposes. Thus, U S WEST sent the notification to all customers, captioning the notice: "To U S WEST Non-Published and Non-Listed Customers only:".) U S WEST received 27,600 calls to the provided 800 number. Out of these calls, only 1,050 customers actually restricted their BNA. The largest percentage of calls to the 800 number were calls where customers originally intended to restrict BNA so they would not be on marketing lists. After explaining that the one had little to do with the other, and explaining the consequences of restricting BNA information, most responding customers chose not to restrict BNA information.

from a privacy perspective. We do not believe it could be substantiated from such perspective. Second, the Commission's mandate that a costly mechanical access restriction mechanism be put in place by the BOCs to assure consumer "privacy" with respect to certain customer choices has imposed a cost on the BOCs far in excess of any predictable -- or evident -- consumer benefit. U S WEST does not believe that the cost should be required on a going-forward basis, for the BOCs or for any other carrier.

The Commission's choice of the term "CPNI" to describe the transactional data held by telephone companies suggests a customer "interest" in such information that has never been analyzed or endorsed. While not being terribly attuned to the significance of the phrase CPNI back when such rules were originally suggested,[47] U S WEST now takes considerable exception to the term.

The term "CPNI" suggests that the information that U S WEST has, as a part of its normal course of business and operating

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[47]At least as pertains the BOCs, rather than their prior parent company, AT&T, these kinds of rules stem from 1986 in conjunction with the BOCs' sale and promotion of CPE, a product not necessarily associated itself with transactional-generated information. The term was simply carried over when the Commission began its investigation into BOC integrated sales of enhanced services. See In the Matter of Furnishing of Customer Premises Equipment by the Bell Operating Telephone Companies and the Independent Telephone Companies, Petitions of BellSouth, Ameritech, Bell Atlantic, and Southwestern Bell, for Expedited Relief from and Limited Waiver of Computer II Structural Separation Requirements, CC Docket No. 86-79, RM-5230, Notice of Proposed Rulemaking, FCC 86-113, Fed. Reg. 119458, rel. Mar. 28, 1986. See also In the Matter of Furnishing of Customer Premises Equipment by the Bell Operating Telephone Companies and the Independent Telephone Companies, Report and Order, 2 FCC Rcd. 143 (1987).

procedures, is not really its business information but is information "belonging to" or somehow "dedicated" to a particular customer.[48] The term seeks to convey, from its very use, some kind of "possessory" interest in U S WEST's business information to individual customers.[49]

U S WEST's business information includes all transactional information that we secure from our network (and our multimedia) operations. It is U S WEST's proprietary information. It is, of course, individually-identifiable information; but that fact alone does not imbue the information with a customer proprietary interest.[50] A more neutral description of the information at issue, such at Telephone Transaction Generated Information (or

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[48]McManus has stated that the phrase "customer proprietary network information" is "a kind of oxymoron[;] . . . 'proprietary' and 'network' are contradictory. 'Proprietary' refers to information that the customer owns. . . . The purpose . . . of a network is to exchange information. . . . Network records cannot be completely proprietary to anyone." McManus Report at 63.

[49]See Katz, James E., Telecommunications Privacy Policy in the U.S.A.: Socio-Political Responses to Technological Advances, Feb. 23, 1989 (Document TM-ARH-013703), at 10 and n.28 (Katz opines that the Commission did not really realize the significance of the term CPNI when it first adopted it, but that it incorporates the "precept . . . that the customer 'loans' the information to the telco for a service, but the control over who has access to that information remains with the [customer] 'owner.'").

[50]The issue of whether a utility customer holds some kind of "proprietary" interest in a company's information is not really grounded in privacy principles at all (or at least in the way those principles have been traditionally understood). The "proprietary" issue should be understood for what it fundamentally is: some kind of mixture of the principles announced in Democratic Central Committee, embellished with a gloss of creative privacy advocacy. See supra note 14.

"TTGI"),[51] would be a more accurate and appropriate term, and it would not dismiss (or demean) the network provider's business interest in the information.[52]

It is clear that total control over how a company's transactional business information is used or distributed is not one to be totally left up to the individual about whom the transactional information relates. Such information will be used by companies such as U S WEST in the same way in which such information is used by other businesses across the United States: in the provision of quality customer service, in product design and development and in marketing.[53] Clearly, such uses do not compromise customer "privacy" expectations, as such is the business/consumer status quo, rather than the exception.

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[51]U S WEST believes that this term was first proffered by Thomas E. McManus. See supra note 12. TTGI has been stated to be "the information generated by telephone usage and by transactions related to telephone service." McManus Report, Overview at 1. TTGI is "the record created by the fact that a telephone communication or some other transaction related to telephone service has occurred." Id., The Charts at 6.

[52]"TTGI . . . has value apart from the transaction itself. It is a commodity that some would like to sell and others would like to buy. But it is also information with value when it is owned exclusively and not sold to others." Id. at 8.

[53]The Commission has always treated CPNI as a "different" kind of customer information than that generally held by other businesses. That treatment, however, does not stem from customer privacy expectations. See Section II., A. Compare the fact that cable companies, generally monopolies in their field, have the freedom to use their customer information for "other services." 47 USC § 551(b)(2)(A). And see Section III., C. While that phrase was recently legislatively circumscribed (47 USC § 551(a)(2)(B)), it still permits cable companies to provide services in markets adjacent to cable services. Thus, it is clear that whatever anxiety is produced by the "monopoly" component of information gathering, it is not one driven by privacy concerns but by competitive ones.

Telecommunications providers, other than BOCs and GTE, are free to and do treat telecommunications transactional information as their own, often times as trade secret information.[54] There should be no restrictions on what information can be accumulated by a business[55] or how that information can be used[56]

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[54]U S WEST considers our customer information trade secret information and it is so treated and protected. Thus, in a rare disagreement with Mr. McManus, we find his conclusion that trade secret treatment would not be appropriate with regard to such information erroneous. See McManus Report at 69 & n.38. Indeed, this is one reason why a business would not provide its subscriber lists or customer transactional information to the public, separate and apart from any privacy considerations of customers. And see supra note 52 (referencing McManus, who notes that transactional information has value when closely held).

[55]Some privacy advocates argue that a business should not be permitted to "over" collect information. However, the precise contours of this argument are not well defined. And, with regard to telephone companies, the customer response has heretofore been contrary to the suggestion that there is an over-accumulation of information by such companies. See Sentry Study at 49-51.

[56]There is an ideological debate over the appropriate type of "information use" principle for American businesses generally. Thus, any "principle" of information use for telecommunications companies -- including common carriers -- must be carefully and thoughtfully crafted. From the perspective of privacy advocates, the more restrictive the phrasing of such principle, the better; from the perspective of businesses, the broader the better.

Many privacy advocates, for example, argue for a "single use" principle of information collection, i.e., that information collected for "one" use cannot be used for "another" use without the express affirmative consent of the individual. Such a "single use" principle essentially ignores any future compatible uses of the information, including informing customers of products/services offered by the business (or family of businesses) which may be of interest to the consumer. U S WEST urges the rejection of such a model. It is unduly restrictive and contrary to the promotion of free speech within the context of commercial relationships and transactions.

The contrary model, that suggested by the Organization for Economic Co-Operation and Development ("OECD") phrasing a model that was used for current federal fair information practices legislation with respect to the Federal Government (see Privacy Act of 1974, 5 USC § 552) and the model currently being employed

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internally. Market responsiveness and customer satisfaction goals can be expected to exert appropriate controls with respect to both.

To the extent that the Commission's CPNI Rules turn these market principles on their head (mandating prior "authorization" with respect to customers with over 20 lines), they are already more intrusive with regard to a business' use of its own information than is required by market phenomena.[57] There

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[56](...continued)
by many American businesses -- including U S WEST -- in developing their own fair information principles/values/practices), is that individually identifiable information accumulated by an entity should be used for the purpose for which it was gathered and can be used for other purposes "not incompatible" with the original accumulation. See OECD Guidelines on the Protection of Privacy and Transborder Flows of Personal Data (Paris, 1981), Part Two, Basic Principles of National Application, Principle 9 (Purpose Specification Principle), at 10. Certainly, this would align itself with customer expectations and is the principle currently supported by most business entities. (In the early 1980s, over 180 American businesses endorsed this Principle. It is questionable whether so many businesses would have done so were this OECD Guideline Principle worded differently.) It is only an "incompatible use" that would be expected to cause customer concern.

[57]The Commission's rules on privacy/affirmative authorization, applying as they do to large businesses, stretch the notion of "privacy" a bit far. Businesses do not generally enjoy "privacy" rights, although they may have competitive or trade secret rights of their own. Furthermore, businesses of this size would be presumed to be the customers most educated and most aware of their prerogatives about business/customer relationships. See U S WEST Computer III Remand Comments, Appendix A at 75-78. They could -- at any time -- ask that a business not use their information. They certainly do not need to wait to be asked for their "permission" to use.

Theory aside, however, it can be argued that the Commission's affirmative authorization requirement reflected the record before the Commission at the time the requirement was adopted. Large customers, and their associations, argued that they had a "confidentiality" interest in such information and a number demanded an affirmative consent requirement. While the Commission may have crafted its existing prior authorization
(continued...)

should be no legal requirement that a company secure its customers' affirmative consent or "approval"[58] before using transactional information internally in any way that the company deems appropriate.

It is only competitive drivers that seek to create an "equal access" or restricted access model to the use of telephone company customer information. Yet, there are only two ways in which parity of access can be created. "Equal" access to information about existing telephone subscribers can be created either by providing third parties with the same kind of access currently enjoyed by the telephone companies themselves; or by restricting the existing access of the telephone companies to their own subscriber information. The first method compromises customer privacy expectations; the second has a clear and present potential to suppress customer product and service information and, ultimately, purchasing choices.

Because the first model clearly compromises customer expectations, no serious proponent of either privacy or market satisfaction could support it. It is no surprise that it has not been seriously advocated by federal regulators and that precisely

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[57](...continued)
requirement to "comport" with its record, the record in fact was far from representative of all large businesses. Even today, U S WEST is met with distress and confusion from large business customers calling for service who are advised that certain of our service representatives "cannot" access their CPNI because the customer failed to return a form "affirmatively" authorizing us to do so. Many of these customers are dumbfounded by the explanation.

[58]This is the language of the most recent Markey Amendment to H.R. 3626. See discussion in Section III., B., below.

the contrary approach has been endorsed by federal legislators.[59]

The other model by which "equal access" to customer information might be created, i.e., the one in which no entity uses the information absent affirmative customer consent, deprives the business having the existing business relationship with the customer from using its own customer information.[60] Advancing some amorphous "competitive parity" environment in this latter way, however, defeats quality service principles and compromises customer expectations that they be informed by an existing supplier of new products and services in which they might be interested.

The second privacy/market aberration stemming from the current over-responsive/over-protective approach of the existing CPNI Rules is the fact that the Commission has required an elaborate, mechanical access restriction and password identification mechanism with regard to CPNI, rather than merely a use restriction. No other American business that U S WEST is aware of is subject to a "mechanical password ID" restriction. It would be sufficient, if any restriction on use at all was required with respect to telephony customer transactional information (which it sometimes is, due to customer request), to impose a "use" versus a "mechanical access" restriction. The Commission's mechanical "password restriction" mechanism has

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[59]See Section III., C., below.

[60]There is a "compromise" model currently proposed by the Markey Amendment to H.R. 3626, which was recently passed by the Energy and Commerce Committee. That "compromise" is discussed more fully at Section III., B., below.

already imposed a cost on BOCs far in excess of the benefits to be derived by the general public and one not required for any other business entity that creates and uses customer transactional information. Such requirement, as imposed currently on the BOCs, should be reversed.

The wonders of technology allow individual choices regarding the use of information to be noted on individuals' records.[61] Access restrictions, as opposed to use restrictions, are totally inappropriate as a mandated component of any information or privacy policy involving a company's use of its own internal information.

B. Pending Telecommunications CPNI Legislation

There is currently pending legislation that would, if passed, impact on the matter of CPNI use and access. No meaningful discussion of the Commission's CPNI Rules would be complete without a discussion of those pending proposals, their logic and sagacity. H.R. 3432 ("Markey Bill") and S. 612 ("Kohl Bill") (collectively "Bills") both contain provisions pertaining to CPNI. Furthermore, a Markey Amendment to H.R. 3626 ("Markey Amendment" or "Amendment") has been proffered and approved by the Energy and Commerce Commission. That bill appears, at the moment, to be the more significant bill for purposes of

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[61] Compare TCPA Report and Order, supra note 22, 7 FCC Rcd. at 8766-67 ¶ 24 (requiring businesses to establish and maintain internal "Do Not Call" or "Do Not Disturb" lists with regard to individuals who ask that the business not market to them). And see In the Matter of U S WEST Communications, Inc., Petition for Computer III Waiver, CC Docket No. 90-623, Petition for Waiver filed by U S WEST on Apr. 4, 1994, at 3, n.5; Appendix B at 2, n.1.

discussion of the CPNI issues, and U S WEST focuses our discussion around that bill.

The current Markey Amendment contains various provisions dealing with CPNI and customer information. In many respects this Amendment is similar to Senator Markey's earlier H.R. 3432. But in some significant respects it is different. The differences are the most material for purposes of this discussion.

Markey's H.R. 3432 pertained only to local exchange carriers ("LEC"), while his Amendment pertains to "common carriers" generally. This might, at first glance, be seen as a step in the right direction, in that the change in scope at least minimizes the problem of discriminatory treatment as between traditional LECs and other carriers, many of whom shortly will be offering local exchange services of one kind or another. However, it remains unclear why such businesses should have legislatively-mandated information practices and procedures so significantly out of line with other telecommunications or multimedia providers or other businesses.[62] U S WEST does not believe that it can be demonstrated that customers' privacy expectations are materially different with respect to such businesses. Thus, the difference in treatment remains confounding.

For example, as part of the Markey Amendment, under the phrase "Privacy Requirements," it is stated that common carriers shall not "use" or "disclose" certain customer information -- absent the customer's "approval" -- "in the provision of any

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[62]See Section III., C., below.

service other than (i) common carrier communications services, (ii) a service necessary to or used in the provision of common carrier communications services," or information services provided as of March 15, 1994. Furthermore, such information cannot be used "in the identification or solicitation of potential customers for any service other than the service from which such information is derived" (i.e., common carriage) or in the provision of CPE.[63]

As the information earlier submitted on customer expectations and information sharing among affiliated businesses demonstrates, there is no "privacy"-based reason for such restrictions -- especially for such restrictions being legislatively mandated. Such restrictions not only operate contrary to customers' privacy expectations, they can also operate to frustrate subsequent purchasing decisions.

Such legislation seeks to establish artificial market "walls" around products/services with respect to which a business' transactional information can be used. Customers do not necessarily perceive these "walls" in the marketplace or in the delivery of products and services. Thus, such legislation can actually work at cross-purposes to customer expectations.

There are two provisions in the Markey Amendment, however, that mitigate against its otherwise prohibitive approach. First, a carrier can secure a customer's "approval" to use customer information. Second, the carrier can use such information for inbound marketing contacts or referrals, if the customer

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[63]See Markey Amendment, Section 232(c)(1)(A)-(C).

"approves of the use" during the call itself.[64] While such provisions are certainly an improvement over previous iterations of the material, e.g., H.R. 3432 required the "affirmative request" of the customer and contained no inbound calling provision, they still do not promote customer privacy or quality service. Furthermore, such requirements do not promote efficiency -- one of the goals endorsed by the Commission in its establishment of its CPNI Rules.

While restricting a business' use of its transactional information to certain purposes only absent customer "approval" might appear to be a "pro-privacy" position, the absence of such requirements for other businesses suggests to the contrary. Furthermore, such a model heavily elevates form over substance. The fact that such "approvals" are required only for telecommunications common carriers, as opposed to other businesses and other industries, suggests that the requirement is arbitrary, at least from a privacy perspective. And, because of the existing relationship between common carriers and their customers, all evidence suggests that the overwhelming majority of existing customers would approve the carriers' access to and use of information about them. The process of securing "approval" would simply consume precious time and money. The process would be a very inefficient means to an overwhelmingly

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[64] See id. Section 232(c)(5). And compare Caller ID/ANI Order ¶ 8 (noting that "even small efficiencies on individual calls could become significant in the aggregate"), ¶ 9 (nothing that "consumers and individuals benefit . . . by having transactions completed more quickly and more accurately"). neither efficiency nor customer service is advanced by seeking approval from customers to engage in business activity they already expect.

predictable end. In short, the compromise cannot be demonstrated to be privacy motivated, and it imposes an irrational economic cost on the provision of quality customer service. The compromise is not pro-consumer, but simply attempts to minimize the adverse impact on consumer purchasing that can be expected if the information-incumbent business is deprived of the opportunity to use its own information and imposes an unnecessary cost to future customer offerings.[65]

A legislative model, such as that found in the Cable Acts,[66] that allows use of customer information for a variety of services offered by the business entity, is more aligned with customer "privacy" expectations and should be the model followed, if any regulation or legislation beyond the Commission's currently-promulgated CPNI Rules is required. Absent some compelling evidence that customer privacy expectations differ as between common carriers and other providers of telecommunications services, the Commission should advise Congress that the pending customer information use/disclosure legislation should be reformed along the lines of already existing legislative models.

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[65]The fact that it only minimizes the adverse impact is important. For example, unless a company secured the "approval" of its entire customer base, it is relegated to securing "approval" on individual inbound calls. It does not seem reasonable to assume that a business would engage in serious product design and development work with regard to a product that it could only sell on inbound calls. Thus, the number of product/service choices a customer could enjoy would become artificially constrained due to the limited permissible delivery channels.

[66]See discussion below at Section III., C.

C. The Cable Acts and the Video Act

The existing Cable Acts and the Video Act reflect legislatively-mandated "information policy" with respect to certain American industry segments or businesses. A review of these Acts demonstrates that none of them prohibits a business from accumulating and using its own transactional business information in the ordinary course of business for the full panoply of acceptable business purposes, including new product development and marketing.[67] While allowing such internal use, all of them require affirmative customer consent before transactional data specifically identifiable to the consumer can be released to third parties.[68] And all of them contain specific provisions regarding the practice of subscriber list generation, allowing the generation of such lists provided consumers have the opportunity to "opt-out" of the list periodically.[69]

Under the terms of the Cable Acts, a "cable operator may use the cable system to collect [personally-identifiable] information in order to obtain information necessary to render a cable

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[67]See Cable Acts, 47 USC § 551(b). Unlike the Cable Acts, the Video Act does not contain a legislative provision affirmatively permitting the use of personally identifiable information by a business. Such use is left undisturbed. The Act does control disclosure, however, permitting disclosure only under certain defined circumstances. One of those circumstances is in the "ordinary course of business." 18 USC § 2710(b)(2)(E). Thus, the term is narrowly defined in the Video Act.

[68]See Cable Acts, 47 USC § 555(c); Video Act, 18 USC § 2710(b)(2)(B).

[69]See Cable Acts, 47 USC § 551(c)(2)(C); Video Acts, 18 USC § 2710 (b)(2)(D).

service or other service provided by the cable operator to the subscriber[.]"[70] Until 1992, this provision allowed cable companies to use such information for any "other service" it offered -- regardless of the nature of the service. Certainly, then, when the Act was passed in 1984, no one saw a "privacy" concern over the broad use of such information.

In 1992, the term "other service" was defined and limited to mean "any wire or radio communications service provided using any of the facilities of a cable operator that are used in the provision of cable service."[71] While apparently feeling the need to restrict the allowable purposes to which cable transactional information could be put, it seems clear that telephony services, as well as enhanced services, provided via the same facilities as cable services, would qualify as "other services."

The fact that customer transactional detail accumulated by cable company can be used for more than one permissible purpose should not be overlooked, nor its significance diminished. A cable company providing telephony, for example, is currently able to use its own transactional records to target those consumers that it believes might be most interested in purchasing different telephony or telephony/cable or telephony/information services or cable/telephony/information services packages (e.g., basic

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[70] 47 USC § 551(b)(2)(A).

[71] 47 USC § 551(a)(2)(B).

telephony, flat-rate telephony with flat-rate cable, usage-based telephony with usage-based cable or any other combination).[72]

U S WEST is not saying that such use is inappropriate. Indeed, we believe it is a legislative recognition that consumers do not consider their privacy expectations necessarily compromised by "other" uses.[73]

The Cable Acts legislation represents a very conservative,[74] though not totally unfair, approach to information practices, as between the cable operator and the consumer. Information necessary to the operation of the business, including information necessary for the propagation of certain additional products/services and the delivery of quality customer service, is permitted to be gathered and used by the business itself. It is only fairly unrelated information uses and the disclosure of transactional information to entities not

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[72]This assumes the service is "provided using any of the facilities of [the] cable operator that are used in the provision of cable service." Id. It also assumes that a cable operator providing telephony services would not be constrained from such usage by other legislation (e.g., legislation that included cable operators as telecommunications "common carriers," as that phrase is used in the current pending telecommunications legislation). See discussion above at Section III., B.

[73]As a result of the Cable Acts' mandated consumer notification provisions (see 47 USC § 551(a)(1)(A)), it is probable that the cable company would have to describe "the nature" of other uses in its notification. However, such would not be a formidable hurdle to usage, as the consumer does not have a legislatively granted right to refuse to allow the business to use the information. U S WEST assumes, however, that in the spirit of market satisfaction a business would not use information about a consumer in a way contrary to the consumer's expressed desires.

[74]The Acts are conservative in that in the most recent definition of "other services" (see supra note 71), the Acts restrict the scope of cable company usage of transactional data in a way not imposed on other business or commercial enterprises.

in a relationship with the subscriber that is circumscribed. Furthermore, mailing lists can generally be provided to third parties, using an opt-out approach.[75]

The Cable Acts model is, though overly cautious and conservative, generally reflective of customer expectations. However, the "privacy" or "fair information practices" policies suggested by that model are, in certain particulars, more restrictive than is necessary to protect consumer privacy.

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[75]The Video Act takes a similar approach. Identifications of specific videos cannot be provided to third parties without affirmative consumer consent; mailing lists (including those segregated by "category" of videos rented) can be provided utilizing an "opt-out" approach. 18 USC § 2710(b)(2)(D).

While telecommunications companies generating consumer transactional detail are not likely to share that transactional detail with third parties absent at least customer notification, such companies might make available customer lists derived from identifiable characteristics (such as is currently permitted by the Video Act, and which occurs with credit card pre-screening). The fact that such practices are generally permitted by existing legislation demonstrates that such list practices are not per se violations of consumer "privacy" expectations. Furthermore, additional evidence suggests that, if done correctly, this kind of information sharing as between a business with a customer relationship and one without such a relationship would not compromise customer privacy expectations. See 1990 Equifax Report, Westin Commentary at XXIV ("a very large public majority would consider it acceptable for original information collectors to furnish the names and addresses of persons who meet criteria as prospects for direct marketers to use in making offers to consumers if three conditions are met: (1) Only broad categories of consumers are identified to marketers (e.g., ranges of income, not detailed financial status); (2) Consumers can opt out of having their names furnished by the original collector or can have their names removed from mailing list databases; and (3) Such lists will not be used to screen out or deny consumers a benefit or opportunity they apply for.").

Another way in which the above kind of market facilitation between interested sellers and potential buyers might be accomplished is through an "information intermediary." That intermediary would either create or purchase a list, extend an offer to potential buyers, and have the affirmative responses directed to the seller. U S WEST is currently actively pursuing this kind of market mediation function.

The Cable Acts currently state that a customer must give written or electronic consent before a cable company can release consumer transactional detail to third parties.[76] Such a requirement is, again, a very cautious information practice approach to the release of information. While it certainly "protects" any consumer privacy expectation that might be had in the information,[77] it simultaneously imposes a high barrier to release, i.e., the securing of some kind of "affirmative" consent.

While it may have seemed appropriate to legislatively mandate affirmative customer consent at the time that the 1984 Cable Act and the 1988 Video Act were enacted, U S WEST is concerned about the untested assumption that legislatively-mandated or company-adopted affirmative consent-type release provisions are the only kind of customer choice/control tools or mechanisms that can operate to accommodate consumer privacy

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[76]47 USC § 551(c)(1). Compare Video Act, 18 USC § 2710(b)(2)(B).

[77]Not all consumers will have a privacy expectation in such transactional data. Yet, under the Cable Acts and the Video Act, the information cannot be released unless the consumer affirmatively consents. This model, then, assumes a privacy interest on behalf of all consumers, regardless of whether or not it exists, and resolves the ambiguity of all inertia against disclosure.

expectations.[78] As we discuss in greater detail below,[79] we do not believe such is the case.

As a general matter, in an information economy, U S WEST supports an opt-out model of customer "consent." This would be true even with respect to transactional information, provided the market circumstances surrounding the disclosure make the use of such model appropriate and the disclosure were aggressive and explicit. Information generated by a business could be used by that business for normal business purposes and could be provided to others upon appropriate disclosure, assuming a customer had not indicated otherwise.

While this is the option we see as the most preferable, we do understand (and endorse) the fact that different circumstances can compel the use of different models. For example, given the historical confidentiality expectation that customers have vis-a-vis traditional telephone companies, the information practices of such companies and the representations those companies have made to their customers, it seems apparent that the use of an opt-out model for release of customer telephony transactional information to third parties (other than a telephone company's affiliates)

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[78]Furthermore, the more the "affirmative consent" model is promoted as the way to protect consumer privacy, the more in jeopardy becomes the release and use of heretofore generally available public record information. This could become a dangerous trend. Many public jurisdictions would not have the resources to initiate an affirmative consent model of information release. They would often be more inclined to simply cease providing the information. This would work contrary to the principles surrounding access to government information and the kind of openness traditionally accorded to such information. See Gassert, Timothy B., Big Brother Syndrome, Massachusetts Records Review, Winter 1989/1990 ("Big Brother Syndrome") at 7.

[79]See Section IV., B., below.

would probably not be currently acceptable from a market perspective. That does not mean, however, that customers would not accept such an approach from a different company with whom they have a different relationship and different expectations. Thus, from a market-satisfaction perspective, in some circumstances affirmative consent might be the best model, while in other circumstances such a model would amount to expensive form over substance.

Another area in which the Cable Acts are currently "over-responsive" to perceived privacy concerns is in the area of subscriber notification requirements. The Cable Acts require that a cable operator periodically notify its subscribers regarding, among other things, "the nature of personally identifiable information collected or to be collected with respect to the subscriber and the nature of the use of such information."[80]

As indicated above,[81] it is an exercise in form over substance for a business to advise customers of the obvious, i.e., that information about them is accumulated and used internally in a business and, perhaps, among affiliates. The internal use is generally self evident; and the affiliate use is acceptable. A notification or disclosure statement only appears material and meaningful if a business will be disclosing customer information to third parties -- something a consumer might not anticipate.

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[80] 47 USC § 551(a)1(A).

[81] See supra notes 12, 44 [SWBT] and accompanying text.

A reading of current cable customer notifications would support the proposition that much of the information conveyed therein is largely already expected and understood by the recipient.[82] What information the cable company collects and what it does with the information internally is not very revelational. Virtually any business that collects and uses transactional data could write the same "Privacy Notice," changing -- perhaps -- just a few terms to fit the appropriate industry setting.

Since so much of the information conveyed by the cable notices is information which customers would not find surprising or unexpected,[83] in many respects the most significant and

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[82]Copies of two Cable notifications are attached as examples. Appendix C, Cable Notice advises that the company collects information such as "name, address, telephone number and other personally identifiable information;" and that the information is used "to sell, maintain, disconnect and reconnect services; to make sure that [the customer is] being billed properly," etc. The information provided is neither unknown nor unexpected.

Appendix D, Cable Notice provides a more definitive list of the kinds of personally identifiable information that the cable company might collect. Again, the list produces little surprises regarding the information collected, and it would produce even less surprise for the customer who had just gone through an ordering process and been asked to produce the kinds of information identified in the Notice. After identifying the information collected, the Notice advises that the "information is collected and used as necessary to render or conduct legitimate business activities related to the services which the cable television company provides," including "Assembling marketing and research information." Again, there are no surprises.

[83]U S WEST admits that most cable customers would not "know" a company's internal record-keeping practices, but advising a customer that information will be maintained "for as long as we provide service to you, and for a longer time if necessary for our business purposes. [And,] [w]hen information is no longer necessary for our purposes, we will periodically destroy the

(continued...)

material function of the current cable notice is to advise customers about the "list" practices of the cable company in question, and to provide the recipient with an opportunity to opt out of such lists.[84] In this regard, the notice serves the same function as would a mailing or subscriber list notification under the Video Act,[85] or a notification found in a catalog regarding subscriber list sales practices. The message and the customer control mechanism, i.e., opt out, are in conformity with the general industry practices regarding list generation and customer choice.

As discussed more fully below,[86] there are many different ways by which customers might be afforded choice/control tools with respect to information use and distributions. Customer notifications are but one mechanism. Essentially, customer notifications are only appropriate when there is a message to

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[83](...continued)
information. . . ." does not convey much material information. See Appendix C, Cable Notice. Compare Appendix D, Cable Notice ("the cable television company retains the personally identifiable information it collects for as long as it is needed for the purpose(s) for which it was collected."). Any customer who had ever thought about record retention could have recited a retention principle along the lines of what is disclosed.

We also admit that most customers would not know of their legislatively-granted right to access and correct personally-identifiable cable company transactional data. See 47 USC § 551(d). While this right might be important to "know," we suspect the importance is more abstract than real and doubt that many subscribers exercise it.

[84]47 USC § 551(c)(2)(C).

[85]18 USC § 2710(b)(2)(D). U S WEST provides a similar notice to our customers in the our White Pages Call Guide.

[86]See Section IV., B., below.

convey that might not be expected by the consumer[87] and the customer is being provided the message so that it can exercise choice or control with regard to the contents of the message conveyed. Unless market circumstances warrant customer notifications, the exercise is merely one that depletes precious and limited resources.

IV. INFORMATION POLICY CONSIDERATIONS

A. Transactional Data

The Commission in its CPNI Public Notice seeks comment on CPNI, something it describes as "any information about customers' network services and their use of those services that a telephone company possesses because it provides those network services."[88] Yet, CPNI is but one kind of network transactional data and the term and correspondent Commission Rules have historically been

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[87]This is different than "not known" by the customer. A consumer might not "know," in any absolute sense, that information is shared among affiliates or provided to transport or information providers whom they access. However, the fact that such information is shared or provided would not be unexpected or surprising, and it should be totally acceptable.

[88]CPNI Public Notice at 1 (citation omitted). U S WEST has previously advised the Commission that what it recites is a "description" of CPNI, as individual BOCs were required to identify in their respective ONA Plans those items which they considered to be CPNI. See In the Matter of Policies and Rules Concerning Local Exchange Carrier Validation and Billing Information for Joint Use Calling Cards, CC Docket No. 91-115, Comments of U S WEST Communications, Inc., filed Aug. 15, 1991, at 15-18. Not all Plans reflect the same items, and yet all Plans have been approved. See In the Matter of Filing and Review of Open Network Architecture Plans, Memorandum Opinion and Order, 4 FCC Rcd. 1 (1988). Thus, for a precise definition of what CPNI encompasses with respect to each company, the individual BOC's ONA Plans would need to be consulted.

applied to but one kind of carrier.[89] Today, there are many kinds of both.[90]

Certain telecommunications transactional data will be "network-based," while other data will be "provider-based." That is, the network or system provider may know when certain services were accessed, where they were accessed from, how long the network "session" lasted, etc. However, the service provider will have similar albeit different information.[91]

In establishing any kind of rational information policy around the subject of transactional detail regarding consumers'

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[89]For this reason, among others, U S WEST prefers a broader term such as TTGI. See supra note 51. Even that term, however, is restricted by technology/industry. Mr. McManus focused his definition on telephony-based services and included as "types" of TTGI: white pages information, yellow pages information, new telephone service orders, aggregate telephone traffic information, calling number identification, other network information, call detail records, billing and credit information. See McManus Report at 8-9. Compare the recent National Telecommunications and Information Administration ("NTIA") Inquiry on Privacy Issues Relating to Private Sector Use of Telecommunications-Related Personal Information, Notice of Inquiry, 59 Fed. Reg. 6842 (Feb. 11, 1994) ("NTIA NOI") ¶ 24 (reciting the same types of TTGI as described by McManus).

[90]As different kinds of network providers emerge and as existing providers extend the scope of their service offerings (including Enhanced Service Providers ("ESP"), competitive access providers ("CAP"), cellular companies, and cable companies), a different descriptor may be necessary or the scope of the term, as it now pertains to telephony, will need to be expanded to at least "telecommunications" and, perhaps, beyond. Compare NTIA NOI ¶ 5 ("information generated by interactive multimedia and by telephone usage and transactions utilizing the telephone"), ¶ 13 ("integrated digital streams of video, audio, text, and graphics"); ¶ 14 (services which might "create the electronic equivalent of a paper trail capturing many details of a person's life").

[91]For example, a "gateway" provider will have transactional information about the actual services accessed once the consumer has entered into the provider's system. The network access provider may not have such information, knowing only that a "gateway" was accessed.

uses of network and information services, the Commission must look at the collection and use of consumer transactional detail beyond the confines of traditional telephone companies and networks, and even beyond the future of multiple electronic networks and providers. The technology of transaction detailing is growing for virtually every commercial industry segment -- not out of a pernicious desire to invade consumer privacy, but most often from an attempt to provide targeted quality customer service: to bring those goods and services to those most interested in receiving them.[92] This "use" of transactional data is a far cry from a governmental attempt to invade the privacy of its citizenry by creating a "Big Brother" kind of government. And, this difference must be acknowledged and afforded the consideration it is due.[93]

Furthermore, as the practice of gathering transactional information is not confined to just telecommunications company or

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[92]Compare McManus Report, Overview at 1, Appendix 1 at 28-31, in which he discusses the fact that database marketing, based as it is on customer profiles generated from transactional data from many quarters, is basically an activity in line with trends over the past few years, deployed to get to a more cost-efficient, personalized marketing approach, i.e., to return to the days of the personal salesman with his "market of one."

[93]Serious consideration needs to be given to the different purposes for which individual data is accumulated and used as between businesses and governments. In a governmental arena, the purpose is often punitive (i.e., to catch those securing a governmental benefit inappropriately), while in the private sector, the information is often used to determine the propriety of a benefit extension. The purposes are fundamentally different and the appropriate information policies applicable to each should reflect such differences.